

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CATHY SKINNER and DEPARTMENT OF THE AIR FORCE,
PETERSON AIR FORCE BASE, BIOENVIRONMENTAL ENGINEERING
SQUADRON, MEDICAL CLINIC, Colorado Springs, CO

*Docket No. 03-262; Submitted on the Record;
Issued August 28, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant has established that she sustained a recurrence of disability on or after September 22, 1999 causally related to an accepted October 26, 1998 lumbar strain; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request to change physicians.

The Office accepted that, on October 26, 1998, appellant, then a 44-year-old medical clerk, sustained a lumbar strain when a coworker struck the chair in which she was seated from behind, causing her to fall forward into her computer. She had a prior history of a herniated L4-5 disc with left-sided radiculopathy as of November 21, 1997,¹ a January 21, 1998 motor vehicle accident and a L4-5 hemilaminectomy performed on January 22, 1998.² Subsequent to the October 26, 1998 injury, appellant relocated from Colorado to the Washington, DC area and began work as a claims examiner for the Office on April 10, 1999.

On July 28, 2000 appellant filed a claim for a recurrence of disability commencing September 22, 1999, caused by residuals of the October 26, 1998 lumbar strain. She explained that she experienced severe lumbar pain while keyboarding, lifting heavy files, twisting and

¹ In a November 21, 1997 lumbar magnetic resonance imaging (MRI) scan, Dr. Thomas R. Bates, a Board-certified radiologist, noted a two-month history of "low back pain which radiates into the lower extremities, left greater than right...." The MRI scan showed a left posterior central disc herniation at L4-5 with slight displacement of the left fifth nerve root.

² On January 22, 1998 Dr. Alan R. Murphy, an attending Board-certified orthopedic surgeon performed a left L4-5 hemilaminectomy with microdiscectomy to decompress the left L5 nerve root. In a May 8, 1998 follow-up report, he noted that appellant's back pain had resolved and her leg pain was improving and released appellant to work with a lifting restriction of 20 pounds. Following the October 26, 1998 incident, appellant sought treatment on October 28, 1998 from Dr. Michael A. Yoesel, a Board-certified family practitioner, who noted that appellant's postinjury pain was "very similar" to her preoperative symptoms. Dr. Yoesel diagnosed "low back pain status post lumbar laminectomy."

turning and working 8 to 12 hours per day. By decision dated March 20, 2001, the Office denied appellant's claim for recurrence of disability on the grounds that causal relationship was not established.³

Appellant disagreed with this decision and, in a March 31, 2001 letter, requested an oral hearing before a representative of the Office's Branch of Hearings and Review, held on August 29, 2001. By decision dated and finalized February 22, 2002, the Office hearing representative affirmed the March 20, 2001 decision. The hearing representative found that the medical reports of record were insufficiently rationalized and were factually incomplete as they did not address the January 1998 motor vehicle accident.

Appellant disagreed with this decision and, in a June 14, 2002 letter, requested reconsideration and submitted additional evidence regarding the January 1998 lumbar surgery. By decision dated September 13, 2002, the Office denied modification of the February 22, 2002 decision. The Office found that the medical evidence attributed appellant's condition to the nonoccupational January 22, 1998 lumbar laminectomy and not to the October 26, 1998 lumbar strain or other work factors.

Appellant filed her appeal with the Board on November 12, 2002. In a November 5, 2002 letter, she appealed the Office's denial of her request to change physicians, asserting that the hearing representative did not consider the opinions of all her physicians.⁴

The Board finds that appellant has not established that she sustained a recurrence of disability commencing September 22, 1999 causally related to an accepted October 26, 1998 lumbar strain.

A recurrence of disability is defined by Office regulations as an inability to work, caused by a spontaneous change in a medical condition resulting from a previous injury or illness without an intervening injury or new exposure to the work factors that caused the original injury or illness.⁵ When an employee claims a recurrence of disability causally related to an accepted employment injury, he or she has the burden of establishing by the weight of the reliable, probative and substantial medical evidence that the claimed recurrence of disability is causally related to the accepted injury. This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that

³ Appellant again stopped work on January 25, 2001, remaining off through July 16, 2001, stopped again and sought treatment on August 8, 2001. On December 14, 2001 she claimed a recurrence of disability commencing on January 29, 2001 related to the October 26, 1998 lumbar strain. She stopped work on February 1, 2001. Appellant was on light duty at the time of the alleged recurrence, with accommodations to her medical restrictions. As there is no final decision of record regarding this claim, it is not before the Board on the present appeal. See 20 C.F.R. § 501.2(c).

⁴ Accompanying her request for appeal, appellant submitted additional evidence. The Board may not consider new evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant may submit such new evidence to the Office accompanying a request for reconsideration.

⁵ *Bernitta L. Wright*, 53 ECAB ____ (Docket No. 01-1858, issued May 1, 2002).

conclusion with sound medical reasoning.⁶ An award of compensation may not be made on the basis of surmise, conjecture, speculation or on appellant's unsupported belief of causal relation.⁷

Following the claimed September 22, 1999 recurrence of disability, appellant first sought treatment from Dr. Rida Azer, an attending Board-certified orthopedic surgeon. In a September 22, 1999 report, he noted a history of "low back pain since October 7, 1998" when appellant "was injured at work when she fell off a chair" and had lumbar surgery in January 1998. Dr. Azer diagnosed "[l]umbar disc syndrome; status post-operative to lumbar spine surgery." In an October 27, 1999 report, he found hypoesthesia in the L5 distribution and positive LaSegue's signs bilaterally, marked limitation of range of motion and commented that appellant had significant residuals from her injury of October 7, 1998. Dr. Azer submitted February 23 and July 26, 2000 reports noting continued lumbar pain and a spasm.⁸

There are several deficiencies in Dr. Azer's reports. First, he mentions an October 7, 1998 injury. There is no indication of record that appellant sustained an October 7, 1998 injury. Second, Dr. Azer failed to note the January 21, 1998 automobile accident and appellant's history of lumbar problems prior to that accident. The Board finds that his reports are of diminished probative value as they are based on an incomplete and inaccurate factual history.⁹ Third, although Dr. Azer opined that appellant had significant residuals from her injury of "October 7, 1998," he did not provide medical rationale explaining how and why the October 26, 1998 injury would cause or contribute to the findings on the October 27, 1999 examination. In the absence of such rationale, his opinion is of diminished probative value.¹⁰

Appellant also submitted reports from Dr. Ronald C. Childs, a Board-certified orthopedic surgeon. In February 12, 2001 reports, he noted the January 22, 1998 hemilaminectomy and the October 26, 1998 injury, but not the January 21, 1998 motor vehicle accident or appellant's lumbar difficulties prior to that accident.¹¹ Dr. Childs' opinion is also based on an incomplete

⁶ *Ronald A. Eldridge*, 53 ECAB ____ (Docket No. 01-67, issued November 14, 2001) ; see *Nicole Bruso*, 33 ECAB 1138, 1140 (1982).

⁷ *Patricia J. Glenn*, 53 ECAB ____ (Docket No. 01-65, issued October 12, 2001); *Ausberto Guzman*, 25 ECAB 362 (1974).

⁸ Dr. Azer ordered diagnostic testing. A September 29, 1999 electromyography (EMG) and nerve conduction velocity (NCV) tests showed "[c]hronic left L5 radiculopathy with no signs of active denervation...." A March 17, 2000 lumbar computed tomography (CT) scan and myelogram showed a "central and left-sided disc extrusion L4-5" with involvement of the left L4 nerve root.

⁹ *Kenneth R. Love*, 50 ECAB 193 (1998).

¹⁰ *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

¹¹ In a February 28, 2001 lumbar MRI scan report, Dr. Nicholas J. Patronas, a Board-certified radiologist to whom appellant was referred by Dr. Childs, noted symptoms of lumbar pain with left-sided radiculopathy since mid-1999. Dr. Patronas noted that appellant was "status post L4-5 laminectomy in January 1998 and subsequently fell on October 27, 1998. Left-sided symptoms were present prior to surgery as well." Dr. Patronas stated an impression of a "large recurrent dis[c] herniation at L4-5" compressing the thecal sac into the left lateral recess, likely producing left-sided L5 radiculopathy. Dr. Patronas also found "evidence of degenerative disc disease" at L4-5 manifested by disc space narrowing and decreased signal intensity and expected postlaminectomy changes at L4-5.

factual history. In an April 20, 2001 report, he stated that appellant's lumbar radiculopathy and sciatica were "in all likelihood secondary to a recurrent ruptured dis[c]," representing "an aggravation of her prior work injury" requiring surgical correction. However, Dr. Childs did not provide medical rationale explaining how and why the October 26, 1998 lumbar strain would cause radiculopathy or sciatica or differentiate appellant's current condition from the sequelae of the nonoccupational January 21, 1998 motor vehicle accident and her preexisting lumbar problems. Without such rationale, Dr. Childs' opinion is speculative and of diminished probative value.¹²

Appellant consulted a third Board-certified orthopedic surgeon, Dr. Thomas Schuler. In a March 15, 2001 report, he noted the January 1998 lumbar laminectomy and October 26, 1998 injury, but not the January 21, 1998 motor vehicle accident or the preexisting lumbar condition. Dr. Schuler's opinion is similarly not based on a complete, accurate factual history and of diminished probative value.¹³

Following a failed course of physical therapy and medication, on November 14, 2001, Dr. Schuler performed an anterior lumbar discectomy, partial vertebrectomy and an L4-5 interbody fusion. In a January 16, 2002 report, he diagnosed lumbar radiculitis, lumbar postlaminectomy syndrome related to the January 22, 1998 surgery, a herniated L4-5 disc and lumbar disc degeneration. Regarding causal relationship, Dr. Schuler opined that, based on appellant's records, clinical and surgical findings, the November 14, 2001 surgery was a direct result of appellant's work-related injury of October 26, 1998. He noted that the spinal treatment she received subsequent to October 26, 1998 was directly related to that injury "to a reasonable degree of medical certainty." However, Dr. Schuler did not provide sufficient medical rationale to support his stated conclusion that the November 14, 2001 surgery was a direct result of the October 26, 1998 lumbar sprain. His rationale is deficient in that it failed to address appellant's lumbar condition in 1997, the nonoccupational January 21, 1998 motor vehicle accident and the January 22, 1998 lumbar surgery. Dr. Schuler did not provide a complete history of these events or distinguish their residuals; if any, from these of the October 26, 1998 accepted lumbar sprain. Therefore, his opinion is insufficiently rationalized to establish causal relationship in this case.¹⁴

Consequently, appellant has not established that she sustained a recurrence of disability, as she submitted insufficient rationalized medical evidence to establish a causal relationship between her condition on and after September 22, 1999 and the accepted October 26, 1998 lumbar sprain.

The Board finds that the Office properly denied appellant's request to change physicians.

¹² *Lucrecia M. Nielsen, supra* note 10.

¹³ *Kenneth R. Love, supra* note 9.

¹⁴ *Lucrecia M. Nielsen, supra* note 10.

Under section 8103(a) of the Federal Employees' Compensation Act,¹⁵ an employee is permitted the initial selection of a physician. However, Congress did not restrict the Office's power to approve appropriate medical care after the initial choice of a physician to further the objective of ensuring that an employee recovers from her injury to the fullest extent possible in the shortest amount of time. The Office, therefore, has the broad administrative discretion in choosing the means to achieve this goal within the limitation of allowing an employee the initial choice of a doctor. The Board elucidated this principle in *Marjorie S. Geer*,¹⁶ stating that, while appellant was "not entitled to reimbursement of unauthorized medical care as a matter of right, the Office nevertheless has the discretionary authority to approve unauthorized medical care which it finds necessary and reasonable and is required to exercise that discretion." The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.¹⁷

Sections 10.316(a) and (b) of the implementing federal regulations¹⁸ represent the Office's exercise of discretion under section 8103(a) of the Act. Section 10.316(a) provides that when the physician the claimant originally selected to treat an occupational injury refers him or her to a specialist for further care, the employee is not required to consult the Office for approval. However, if an employee wishes to change physicians for any other reason, he or she "must submit a written request to [the Office] with his or her reasons for desiring a change of physicians." Section (b) provides that the Office "will approve the request if it determines that the reasons submitted are sufficient." A common example of such a reason is "the need for a new physician when an employee has moved."¹⁹

Subsequent to the October 26, 1998 injury, appellant relocated from Colorado to the Washington, DC area in approximately April 1999 and needed to find a new orthopedist. She chose Dr. Azer, a Board-certified orthopedic surgeon, who treated appellant from September 22, 1999 through July 26, 2000 and ordered several diagnostic tests showing a herniated L4-5 disc with nerve root involvement requiring surgical correction. However, appellant did not wish to undergo a second lumbar surgery. Thereafter, in May 21 and October 30, 2000 letters and in a January 25, 2001 telephone call, she requested to change physicians from Dr. Azer to Dr. Thomas Schuler, a Board-certified orthopedic surgeon who recommended nonsurgical treatment. At the August 29, 2001 hearing, appellant asserted that Dr. Azer just wanted to "pass her off" to a surgeon, so she sought treatment from Dr. Schuler and Dr. Childs, also Board-certified in orthopedic surgery.

¹⁵ 5 U.S.C. § 8103(a); *see also* 20 C.F.R. § 10.300(d)(2002) ("The employer should advise the employee of the right to his or her initial choice of physician" except those excluded under the provisions of sections 10.815 to 826).

¹⁶ *Marjorie S. Geer*, 39 ECAB 1099 (1988).

¹⁷ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

¹⁸ 20 C.F.R. § 10.316(a),(b) (2002).

¹⁹ *See Jack B. Wood*, 40 ECAB 95, 109-10 (1988).

However, the record reflects that both Dr. Childs and Dr. Schuler agreed with Dr. Azer's recommendation to perform a second lumbar surgery. In February 12 and April 20, 2001 reports, Dr. Childs diagnosed a recurrent ruptured L4-5 disc with nerve root involvement requiring surgical correction. Although Dr. Schuler attempted conservative treatment from March to November 2001, on November 14, 2001 he performed an L4-5 discectomy, partial vertebrectomy and interbody fusion. Although appellant requested to have the Office authorize a change of physicians based on Dr. Azer's recommendation of surgery, ultimately, she chose two other orthopedic surgeons who also advocated surgery, one of whom ultimately performed the second surgery.

In the decision dated and finalized February 22, 2002, the Office hearing representative addressed appellant's reasons for her request to change physicians. The hearing representative correctly found that, under the Office's regulations, appellant was entitled to change physicians when she relocated to Washington, DC from Colorado and that she exercised this choice in selecting Dr. Azer. She subsequently requested to change physicians to Dr. Schuler, who ultimately performed a second lumbar surgery. The Board finds that the Office hearing representative's review of the record and discussion of the relevant regulations constitutes a valid exercise of discretion and that the denial of appellant's request was reasonable under the law and facts of this case. Therefore, the Board finds that the Office did not abuse its discretion in denying appellant's request.

The decisions of the Office of Workers' Compensation Programs dated September 13 and February 22, 2002 are hereby affirmed.²⁰

Dated, Washington, DC
August 28, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

²⁰ The Board notes that pages 204 to 211 in the case record pertain to Claim No. 25-120190084. Appellant was the claims examiner in this case and her name appears at the top of these documents. The Office associated these documents with appellant's case record and not the appropriate file.